SUPREME COURT, U. S.
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No. 118

In the Supreme Court of the United States

OCTOBER TERM, 1968

SAM VINCE and PATRINA VINCE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The United States brought this action to recover from petitioners, as guarantors, the balance due (plus interest and costs) on two notes held by the Small Business Administration. The obligations underlying these notes were incurred in 1959, when Vince Mechanical Contractors, Inc. ("Mechanical"), obtained two loans from the Louisiana National Bank of Baton Rouge. As partial collateral Mechanical assigned five accounts receivable, worth $42,243.86, to the bank.

Under the terms of the note Mechanical was responsible for supervising, preserving, and protecting the collateral. The instrument assigning the accounts as collateral designated Mechanical as agent of the assignee for collection of all money due on the accounts.

Petitioners executed guaranty agreements in which they undertook the obligation of paying the balance due, plus interest and other sums payable on these notes, in the event of default by Mechanical. These guaranty agreements provided that petitioners' obligations "shall not be released, discharged or in any way affected, nor shall [they] have any rights or recourse against Bank, by reason of any action Bank may take" under its power to deal with the collateral.

Petitioners' specific undertaking as guarantors was stated to be that, in the event of default by the debtor,

> immediately upon the written demand of Bank, [they] will pay to Bank the amount due * * *. Bank shall not be required, prior to any such demand on, or payment by [petitioners], to make any demand upon or pursue or exhaust any of its rights or remedies with respect to any part of the collateral.

The Small Business Administration purchased a 90% participation in these notes, and on July 29, 1960, the guaranty agreements, together with all other items of collateral, including the five accounts receivable, were assigned to the Small Business Administration.

Mechanical defaulted on the notes and was later adjudged bankrupt. Petitioners defended the instant

suit on the ground that the SBA had never collected the accounts receivable, but instead allowed them to become uncollectible as time-barred, rendering a large amount of the total collateral worthless. They argued that the Louisiana Civil Code controlled and that, under Articles 3037 and 3061 of the Code (Pet. 8), the failure of the SBA to preserve and collect the collateral discharged them from their obligations under the guaranty agreement. In the alternative, petitioners argued that the original value of the accounts receivable should be considered a credit against the amount owed. The district court rejected these arguments, holding that petitioners' guaranty obligation was not conditioned on the continued value of the collateral, and, furthermore, that this was consistent with Articles 3037 and 3061 of the Louisiana Code. 270 F. Supp. at 594-595.

The court of appeals affirmed, *per curiam*, noting that the applicable Louisiana law was not violated by the guaranty agreement, and that, in any event, to the extent the guaranty agreement might be inconsistent with the protection afforded by state law, petitioners had waived the Code provisions they rely on.

DISCUSSION

1. Petitioners' position seems to be that the courts below failed to apply state law in this case, and that the decision, for that reason, is inconsistent with *United States* v. *Yazell*, 382 U.S. 341. Although it is doubtful that *Yazell* requires reference to state law in the instant case, that question is not presented since the court of appeals has in fact applied Louisi-

ana law.[1] It "assum[ed] that we are to apply Louisiana law" (Pet. App. 14) and referred solely to the law of that state. It concluded that the guaranty agreements were not inconsistent with the Louisiana Code provisions by imposing on the guarantors "more onerous conditions" than the debtor himself had contracted for. Moreover, to the extent that the conditions of the guaranty were "more broadly stated" than those of the underlying contract, the protection of Civil Code Article 3037 was found to have been waived by petitioners. The court found nothing in the statute or case law of Louisiana nullifying the capacity of guarantors like petitioners to waive the protection of these commercial statutes. While we do not suggest that there is substance to petitioners' argument that the Fifth Circuit misconstrued Louisiana law, this contention clearly does not warrant review by this Court. See, *e.g.*, *Propper* v. *Clark*, 337 U.S. 472, 486-487; *National Fertilizer Association* v. *Bradley*, 301 U.S. 178, 181; *Wayne County Board* v.

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[1] *Yazell, supra,* involved a "custom-made, hand-tailored, specifically negotiated transaction" and involved applicability of a "peculiarly local" law regarding family property rights. Neither of these factors is present in this case—the contract was clearly a "form" contract and the law petitioner seeks to apply does not relate to an area of paramount state interest. In these circumstances, it would seem that federal law should be applied. See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U.S. 447; *United States* v. *Carson*, 372 F. 2d 429 (C.A. 6). These facts seem to bring this case closer to *D'Oench, Duhme*, which as the Court in *Yazell* expressly reiterated, presented an appropriate situation for applying a uniform federal standard. See 382 U.S. at 354. However, as pointed out above, this question is not actually presented by this case.

Great Lakes Steel Corp., 300 U.S. 29, 30, expressing the policy that the Court will adhere to the interpretation and construction of state statutes adopted by the lower federal courts.

2. In any event, the decision below is plainly correct. Petitioners assert that their guaranty agreement violated Article 3037 of the Louisiana Code by imposing conditions "more onerous" than the conditions of the notes. It should be noted, however, that none of the conditions of the guaranty which the petitioners allege to be "more onerous" (Pet. 10-11) forms the basis of this suit. Rather, the Small Business Administration is relying on its right to recover the balance due on the note, whether from the maker or the guarantor, without first realizing on the collateral, and this right is contained in *both* the principal obligation and the guaranty agreement. Therefore, regardless of collateral, the existence of the right to recover from the guarantor cannot be said to be more onerous in the guaranty agreement than in the principal obligation. Furthermore, even if we assume *arguendo* that the guaranty contained terms which differ from the conditions of the principal obligation (Pet. 10), by nevertheless signing the agreement the petitioners—as the court of appeals held—must be deemed to have waived whatever protection would otherwise have been afforded by the Louisiana Code Article 3037.[2]

Petitioners also assert that the failure of the Small

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[2] The validity of such a waiver is recognized by Louisiana Civil Code Article 11, which specifically enables individuals to renounce laws made in their favor and for their protection, except for laws relating to the preservation of public order or good morals.

Business Administration to collect the accounts receivable held as collateral falls within Article 3061 of the Louisiana Civil Code, which provides that the surety is discharged when the creditor does some act impairing the surety's right to be subrogated to the creditor's interest. Petitioners, by signing the guaranty agreement, made an unconditional promise to pay in the event the principal debtor defaulted. The agreement did not require the Small Business Administration to proceed against the collateral before demanding payment of petitioners. Thus, by signing the guaranty, petitioners in effect agreed to pay regardless of any subrogation right they might ultimately have respecting the collateral. Moreover, since Mechanical agreed to act as the agent of the assignee in collecting on the accounts, the failure to collect on the accounts initially rested with it, and not with the holder of the note. Petitioners knew in August 1964 that these accounts had not been collected; the statute of limitations did not expire until March 12, 1965 (Pet. 6). Petitioners should have paid their obligation under the guaranty, and then proceeded to collect the accounts receivable themselves. In light of petitioners' insistence on contesting their obligation as guarantors while the statute of limitations ran on the accounts receivable, they should not now be heard to suggest that an "act of the creditor" interferred with a subrogation right to which they were entitled. See *Austad* v. *United States*, 386 F. 2d 147 (C.A. 9).[3]

[3] Regarding petitioners' final point (Pet. 11)—their obligation to pay the costs—we point out that Louisiana Civil Code, Article 3040, provides that the surety's liability extends to costs.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

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